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In The

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-117

BURTON IKARD, CHARLES IKARD AND ERMA IKARD,

*Petitioners,*

*v.*

ESTATE OF CHARLES D. WYCHE, Deceased, and MEYER RABEN,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### JUDGMENTS BELOW

The judgments of the District Court and Court of Appeals are attached to Petitioners' Brief as an appendix.

### QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the trial court did not abuse its discretion in refusing to allow Petitioners' Amended Complaint to be supplemented by an additional amendment, where the amendment was tendered after a jury had been empaneled and was expressly found not to remedy the fact that the contract upon which both the Amended Complaint and the additional Amendment were based

was barred by the statute of frauds, and where Petitioners failed to show or attempt to show, either in the Court of Appeals or in the instant proceeding, that the amendment would have circumvented the statute of frauds or otherwise assisted Petitioners.

## STATEMENT OF THE CASE

This suit was brought by Petitioners in an attempt to enforce an alleged contract between them and Charles D. Wyche, now deceased, under the terms of which Wyche allegedly had agreed to loan Plaintiffs money in return for a mortgage on real property. After considerable pre-trial activity, including two pre-trials and the granting on separate occasions of Petitioners' Motion for Continuance and a Motion to Amend, the case came to trial on November 15, 1971. Shortly after the parties arrived at the courtroom and prior to selecting the jury, the Court advised the parties of its belief that Respondent's Motion to Strike was meritorious, and after a brief voir dire by the Court and the selection of the jury, the attorneys were excused. At 1:30 P.M. the Court held a hearing in Chambers on Respondent's Motion to Strike and Petitioners' Application to Amend, the latter of which was filed at that time. Since neither party requested that the hearing be reported, the proceedings do not appear in the record. After hearing arguments for approximately thirty minutes, the Court concluded that the contract upon which both Petitioners' Amended Complaint and additional amendment were based was barred by the statute of frauds, and entered judgment sustaining Respondent's Motion to Strike and dismissing Petitioners' remaining $7,500 claim as insufficient to constitute the requisite jurisdictional amount.

In response to Petitioners' Application for Nunc Pro Tunc order, which complained that the original judgment did not reflect the true intentions of the Court in that it made the dismissal with prejudice, the Court of January 5, 1972, filed an Amended Judgment in order to make clear in the record the basis of its previous rulings. This Amended Judgment pointed out that Petitioners' Application to Amend, filed November 15, 1971, the day of the original Judgment, was overruled for the reason that the proposed amendment did not remove the cause from the statute of frauds. Accordingly, the Amended Judgment also sustained Respondent's Motion to Strike for the reason that the alleged contract was void by reason of the statute of frauds, and dismissed the remaining claim for $7,500.00 as below the jurisdictional amount.

## ARGUMENT

Respondent would first point out that Petitioners' statements concerning the method by which the trial court handled the proceeding are almost wholly without support in the record and, moreover, are misleading and largely incorrect. Although it would be impractical to summarize all of the proceedings, both on and off the record, Respondent would point out by way of example that the trial court did not, as stated by Petitioners (Application for Certiorari, page 7) direct that the hearing on Respondent's Motion to Strike and Petitioners' Motion for Leave to Amend not be reported, but, on the contrary, the hearing was not reported because neither party requested that it be done. Petitioners' further statements that no hearing was held on the motions and that they were afforded

no opportunity to present arguments or authorities likewise are incorrect. In fact, the entire thrust of the argument at the hearing was based upon the failure of the alleged contract to comply with the statute of frauds, and the Court informed the parties that this was the basis of its ruling. If, as is stated by Petitioners, the trial court did not make the grounds of its ruling clear until the Amended Judgment was entered on January 5, 1972, it is most curious why Petitioners on November 26, 1971, chose to file a "Brief in Support of Motion for New Trial", which, albeit futilely, argued only that the contract was not barred by the statute of frauds and that Petitioners should have been granted leave to amend.

We note that in their application, Petitioners' state that the above statements, as well as their assertion that the trial court failed to make clear the reason for its rulings are "according to counsel below" (page 7). "Counsel below" apparently refers to attorney Robert F. Boruk, who, in order to support his then primary (but now discarded) ground of appeal in the Court of Appeals, represented to the Court that he had not entered the case until November 15, 1971, whereas, in fact, he had taken a deposition in the case on October 18, 1971, and had filed with the Court Petitioners' "First Amended Complaint" on October 14, 1971. In any event, even if Petitioners' version of the events transpiring at the time the trial court's rulings were made, were correct, Petitioners have wholly failed to show that they have suffered any prejudice thereby, particularly in light of the fact that, as will be shown below, the trial court's rulings were correct.

In *Foman v. Davis*, 371 U.S. 978 (1962), this court specified

several reasons for which the trial court may properly decline to exercise its discretion to allow an amendment. These reasons include "futility of amendment," "undue delay," "repeated failure to cure deficiencies by amendments previously allowed" and "bad faith or dilatory motive on the part of the movant". All of these reasons are present in the instant case.

Here, of course, Petitioners' amendment was incorporated in their Application to Amend, and the court not only had opportunity to review the amendment, but also to hear arguments thereon and to consider Petitioners' brief in support of their motion for new trial which dealt with the subject. Moreover, the Amended Judgment specifically states at paragraph IV that:

> "Plaintiffs' Application to Amend, filed on November 15, 1971, is denied for the reason that such amendment alleges damages arising from the contract which is void by reason of the Statute of Frauds; * * *"

Since the trial court ruled that even the matter contained in Petitioners' Application to Amend their Amended Complaint is insufficient to withstand the statute of frauds defense, it would be of little use to allow yet another amendment. Although Petitioners have failed to brief or argue either in this court or in the Court of Appeals their apparent belief that the proffered amendment would have satisfied the statute of frauds, they have stressed that their amendment specified the property descriptions of the three tracts of land allegedly covered by the contract. It is, however, no answer to a ruling that the alleged contract was barred by the statute of frauds because of an insufficient property description merely to allege such a property description in one's pleadings. Instead, it

was the contract which was unenforceable because of its failure to specify the property description, and no amount of pleading could change this fact.

In *Fox v. City of West Palm Beach*, 383 F. 2d 189 (5th Cir. 1967), the court held that there was no abuse of discretion in denying an amendment adding new matter that was insufficient under the applicable law. Concerning the sufficiency of the amendment to the Complaint, the court stated that:

> "The sufficiency may be considered on appeal in determing whether there has been an abuse of discretion."

Here, of course, Petitioners have wholly failed, either in this court or in the Court of Appeals, to present any grounds of error, arguments or authorities to the effect that their amendment to the Amended Complaint would have changed the fact that the underlying contract was barred by the statute of frauds. Accordingly, it would be inappropriate for this court to exercise its discretion to grant a writ of certiorari to inquire into a point which the Court of Appeals had no occasion to consider. See also, *Asher v. Harrington*, 461 F. 2d 890 (7th Cir. 1972) and *Key Pharmaceuticals, Inc. v. Lowery*, 54 F.R.D. 447 (S.D. N.Y. 1972). Certainly, Petitioners' contention that the action of the trial court "makes any review of its determination impossible" is untenable. (Application p. 11) Even if the actions of the trial court were done in the manner in which Petitioners stated, and even if this were to be unfair to them, still, Petitioners have failed to even attempt to show that the rulings were incorrect as to the statute of frauds and therefore harmful.

Likewise, in affirming the trial court's refusal to grant an

amendment, the court in *Deloach v. Woodley*, 405 F. 2d 496 (5th Cir. 1969) cited *Foman v. Davis, supra.*, and stated:

> "The liberal amendment rules of F.R. Civ. P. 15(a) do not require that the courts indulge in futile gestures. When a complaint, as amended, would be subject to dismissal, leave to amend need not be granted."

As was stated in *Kirsch v. Barnes*, 157 F. Supp. 671 (N.D. Cal. 1957) aff'd, 263 F. 2d 692:

> "Leave to file and amended complaint should not property be granted unless new facts are made to appear which would remedy the defects contained in the previous complaint."

Moreover, *Chapman v. Sheridan-Wyoming Coal Company*, 388 U.S. 621 (1950), held that since the amended complaint failed to state a claim for relief, the trial court correctly denied an amendment. See also, *Vickery v. Fisher Governor Co.*, 417 F. 2d 466 (9th Cir. 1969); and *Friedman v. Chesapeake & O. RR.*, 261 F. Supp. 728 (S.D. N.Y. 1966).

Other reasons mentioned in *Foman v. Davis, supra.*, also are present. Here, of course, the amendment in question was submitted on November 15, 1971, the day the cause was set for jury trial, and had leave to amend the Amended Complaint been granted, a further delay would have been required. Further, Petitioners had previously requested and received a continuance of the case, and suit was filed on August 5, 1970. In addition, Petitioners had already requested and received permission to file an Amended Complaint, and had done so. Concerning Petitioners' attitude on its repeated failure to cure the deficiency and the delay which an amendment would cause, Respondent notes that in the Court of Appeals, Petitioners went

so far as to argue that, in addition to the amendments theretofore granted and refused, the trial court should be directed:

> "to allow plaintiffs' reasonable time in which to prepare and file an amended complaint stating a cause of action against defendant with provisions that should defendant file pleadings attacking the sufficiencies of plaintiffs complaint insofar as it states a cause of action that these matters should be disposed of sufficiently in advance of trial to allow further amendment if necessary * * *."

Thus, Petitioners appear to be admitting not only that further delay would be necessary, but also that the material contained in their amendment is or may be inadequate to state a cause of action by virtue of the statute of frauds.

Concerning Petitioners' failure even to attempt to show either the Court of Appeals or this court that their amendment cures the statute of frauds problem, Respondent notes that *Neely v. Eby Construction Company*, 386 U.S. 317 (1967), held that it is the policy of this court not to consider issues which have not been presented to the Court of Appeals.

In addition to the other reasons specified in *Foman v. Davis*, there is also a question as to the good faith of Petitioners in this case. Not only did attorney Boruk make the previously discussed misrepresentation to the Court concerning the date he entered the case, but, in addition, there is other material in the record, discussed more fully in the briefs below, which cast doubt upon the credibility of his statements. Moreover, although Petitioners argue that the rulings of the court below leave them:

> "without Judicial recourse to seek enforcement of the contract obligation owed to them by Respondents, or to seek damages for breach of that obligation." (Application, page 9),

Petitioners filed Cause No. C-73-4 in the District Court of Cimarron County, Oklaoma, on February 26, 1973, asserting a cause of action identical to the one in question, and seeking damages of $31,000,000. Thus, it appears that they are, as the moving party, attempting to obtain judgments in both state and federal court for the same alleged cause of action.

As was stated in Moore's Federal Practice, ¶ 61.04[2], concerning the application of F.R. Civ. P. 61:

> "Error in the denial of leave to file a proposed amendment to a defective pleading is not reversible error where the amendment would not have cured the defect."

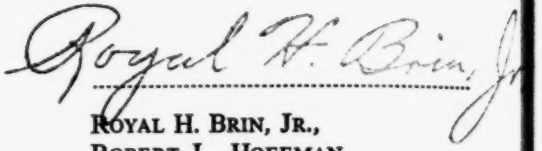
Here, of course, the trial court has so ruled, and Petitioners have made no effort to attack the merits of this ruling.

## CONCLUSION

Petitioners would submit that there are no "special or important reasons" present in this case to merit the exercise of this court's discretion to grant a writ of certiorari. See Rule 19, Revised Rules of the Supreme Court of the United States. There are no novel or unusual points of law, and no questions of public importance, and certainly the rulings of the courts below are not in conflict with any cases of this Honorable Court or of the other courts of appeal. Instead, a remand of this cause merely to require an amendment which the trial

court has already considered in its ruling, would be a futile act.

Respectfully submitted,



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**STATEMENT OF SERVICE**

A copy hereof is being furnished to Ronald L. Goldfarb, 1616 H Street N.W., Washington, D.C. 20006, Peter A. Jaszi, 1616 H Street N.W., Washington, D.C. 20006, and Allen B. Mitchell, 300 East Lee, Supulpa, Oklahoma 74066.